No. 17933

United States Court of Appeals
For the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant,*

vs.

E. L. FRANCE, TRUSTEE, *et al., Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION NO. 1183

BRIEF OF APPELLEE SIMPSON LOGGING COMPANY

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BRIEF OF APPELLEE SIMPSON LOGGING COMPANY

GENERAL STATEMENT

Appellee SIMPSON LOGGING COMPANY is in essentially the same factual and legal position as appellees, Hulda S. Carlson, et al. Appellee is concerned with a stretch of tideland located in Section 26. This section has a separate and different history, having been part of the Fisher Homestead and not part of the original reservation. The importance of this difference is fully discussed in the brief submitted by appellees Carlson, et al., and appellee Simpson Logging Company hereby adopts specifically their "Nature of the Case" statement, and argument with respect to the Fisher Homestead. Further, it is the understanding of this appellee that the briefs submitted by the other appellees will cover and set forth

specific portions of the record supporting the trial court's findings of fact. Accordingly, this task will not be undertaken extensively herein.

BURDEN OF PROOF

Appellant's specifications of error numbers 1 through 35 are to the effect that the trial court erred in entering findings of fact numbers 4 through 8, inclusive, 10 through 16, inclusive, 18 through 24, inclusive, 26, 28 through 32, inclusive, 34 through 38, inclusive, 40, 41, 43, 45 and 46. The trial court's findings of fact are presumably correct and will not be set aside unless clearly erroneous. (Rule 52a of Federal Rules of Civil Procedure). Consequently, an appellant seeking to overthrow the findings has the burden of presenting a proper record to the Court of Appeals showing the evidence compelled a finding in his favor. See *Watson v. Button,* 235 F.2d 235 (9th Cir. 1956), *United States v. Foster,* 123 F.2d 32 (9th Cir. 1941), *Grace Bros. v. C.I.R.,* 173 F.2d 170 (9th Cir. 1949), and *Los Angeles Shipbuilding & Drydock Corp. v. U. S.,* 289 F.2d 222 (9th Cir. 1961).

The appellant's mere challenging of the findings does not cast the onus of justifying them upon the Court of Appeals or the appellees. The appellant, in seeking to overthrow these findings, has the burden of pointing out specifically where the findings are "clearing erroneous." See *Glen Falls Indem. Co. v. U. S. ex rel. and to Use of Westinghouse Elect. Supply Co.,* 229 F.2d 370 (9th Cir. 1955). Rehearing denied 1956. Appellant has failed to meet this burden.

Appellant refers to very few specific portions of testimony by witnesses, and the accuracy of some of these references is questionable. For example, appellant on pages 19-20 of its brief states:

> "We particularly recommend some delightful testimony by Mrs. Louise Pulsifer and Mrs. Emily Miller . . . the latter testified that often when she was a little girl she caught sole on the tidelands by walking in shallow water until she stepped on one, whereupon she promptly captured it." (Tr. Pg. 281, 282)

Mrs. Miller's testimony with respect to flounders (the word sole was not used) was actually as follows:

"Q. And did they eat flounder?

A. Yes, flounders. That is a lot of fun for me.

Q. Now, tell us about that.

A. He (her father) used to go down to the Wilson Slough, they call it, we would go down in the summer time and take a long gillnet and set it right across the mouth of the creek in the summer time, and when the tide went out, my sister and I used to go out and grab great big flounders and make one or two flops, and we would be down in the mud. But that was a lot of fun."

The appellant's version of the testimony places the event on the tidelands and states the sole were stepped on by the witness. Actually, the witnesses story concerns the mouth of the creek and relates how, as children, they would grab the flounders stopped by their father's net.

Again on page 41 of the brief, appellant supposedly refers to a specific portion of the testimony.

> "During the depression, for example, hordes of Indians wandered over the area." (Tr. Pg. 486)

The pertinent testimony on page 486 of the transcript is as follows:

"Q. Now do you remember the depression?

A. I sure do.

Q. By that time you were married and had your children?

A. Yes.

Q. How much use of the tidelands in front of the reservation did the Skokomish Indians make?

A. Well, they at that time, to my knowledge, from Potlatch up to Nalleys, or what they call — what is called Nalleys now, around the flats we called it then.

Q. Well, I don't mean the extent of the ground, I mean the number of people.

A. Well, I guess all of us were down there."

The appellant has stated conclusions in its brief and has made general sweeping references to the record, but this does not sustain the burden of pointing out specifically where the findings are "clearly erroneous".

In most every case there is a key or crucial issue which if resolved one way, makes it necessary for the court to consider many additional issues, but if resolved the other way renders consideration of the other issues unnecessary. This case is no exception. The appellant, having taken the approach it has to this case, has made the question of the Indians' understanding at the time of the Treaty just such an issue.

The appellant at the trial court level had the burden of

proving it was the understanding of the Indians that, under the Treaty, they were to receive the tidelands in question. Apparently, appellant has recognized it could not prove this by direct evidence for appellant has relied upon the "environment" argument which requires proof of the following:

(1) The tidelands in question were essential to the Indians' livelihood, and

(2) accordingly, it must have been the understanding of the Indians that they were to have the tidelands in question.

Appellee does not concede that, even if such were the case, the reservation could now be expanded beyond the established boundaries. However, the trial court, as shown by its findings of fact, found contrary to appellant's position, and accordingly, consideration of the other issues was actually unnecessary. Now at the appellate court level the appellant has the burden of showing that said findings were "clearly erroneous." Appellant has failed to do so, and consideration of other issues is unnecessary.

The suggestion of appellant that the tidelands impliedly must be regarded as having been a part of the area assigned for reservation purposes because the subsistence of the tribe was dependent upon the use of the beach, and particularly for shell fish, is not borne out by the facts.

The treaty itself and the available evidence of matters leading up to the treaty contain virtually nothing to justify the thought that shell fishing, particularly at this location, was significant.

Article IV of the Treaty (Exhibit 3) contains the only reference to shell fish and that is as a specification that the Indians "shall not take shell fish from any bed, staked or cultivated by citizens." The same Treaty, again in Article IV, in the only reference to fishing, states "the right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens . . ." Access to shell fish was not a matter which drew particular comment.

The minutes of the meeting of Governor Stevens with the Indians at Point-No-Point on January 26, 1955, Exhibit 10, reflect no reference to shell fish. On page 2 of the typewritten transcript in evidence, the first Indian to speak was a Skokomish who said: "I wish to speak my mind as to selling the land, great Chief! What shall we eat if we do? *Our only food is berries, deer and salmon.* Where then shall we find these? I don't want to sign away all my land, take half of it and let us keep the rest."

The second of the Indians to speak said he did not want ". . . to leave the mouth of the river."

Following this protest the interpreter, Mr. Shaw, explained they were not called upon to give up their old modes of living and places of seeking food but only to confine their houses on the reservation.

After a similar protest by Hool-Hole-Tan, Mr. Simmons, the agent, explained if they kept half their country, they would have to live on it and would not be allowed to g

anywhere else they pleased. However, if a small tract was reserved for the reservation they would have the privilege of going wherever else they pleased to fish.

Following this explanation, the Duke of York said: "My heart is good. I am happy since I have heard the paper read and since I have understood Gov. Stevens, particularly since I have been told that I could look for food where I pleased and not in one place only." Again he says: "We are willing to go up the Canal since we know we can fish elsewhere. We shall only leave there to get *salmon* and when done fishing will return to our houses."

Any argument with respect to the Indians' understanding based on "environment" is answered by the Indians being granted the right to fish at their usual and accustomed grounds and stations.

The ownership of the tidelands was not important to the Indians, the right to fish at "usual and accustomed grounds and stations . . . in common with all citizens of the United States . . ." was important. This being solely an action to try title to the tidelands, the question of fishing rights is not involved.

AMBIGUITY – SURVEYS

Appellant, on page 15 of its brief, argues that the words "along Hood's Canal" used in the executive order were ambiguous. This is inconsistent with appellant's acceptance of the trial court's finding of fact No. 3, to wit:

> "The executive order defines the boundary of the reservation along Hood's Canal as 'thence southerly and easterly along said Hood's Canal to the place of beginning.' The executive order *does not describe the tidelands* in issue in this case, *nor purport to include the same* in the description of the reservation. (Exhibit 4)." (emphasis supplied)

By acceptance of the above finding and finding of fact No. 2, to wit: "the Treaty (Exhibit 3) does not describe the tidelands in issue"; appellant has precluded itself from arguing ambiguity.

Further, as can be seen by the above findings of fact appellant's statement on page 3 of its brief:

> "it was to the proximate *tidelands* that they were relegated by the Treaty." (emphasis supplied)

is unfounded.

The case of *Northern Pacific Ry. Co. vs. United States* 227 U. S. 355 (1913), cited by appellant, is distinguishable. There, the Treaty itself described the western boundary as ". . . thence southerly along the main ridge of said mountains . . ." (Cascade Mountains). The court found the evidence was clear as to the understanding of the Indians and that the subsequent survey did not extend to *the* main ridge, but rather to a lesser ridge. Accordingly, the survey was set aside and a subsequent survey, which did extend to the main ridge, was confirmed.

However, in the present case the Treaty clearly provided the reservation would thereafter be surveyed and set aside. The executive order did so. As admitted by appellant, neither the Treaty nor the executive order

described or purported to include the tidelands in question. The total and specific area contemplated was included in the survey and executive order, and the tidelands in question were not a part thereof. There is no ambiguity.

STATUTE OF LIMITATIONS
and
DOCTRINE OF LACHES

Appellant's Exhibit 42 diagrams the various sales made by the State of Washington to private owners and users. These acquisitions began around 1901 and other early dates appearing are 1909 and 1911. The admitted facts in the pre-trial order show a series of State of Washington conveyances. In the region abutting section 26 these generally ran in favor of Potlatch Commercial and Terminal Company, a predecessor of Phoenix Logging Company, which in turn is the predecessor of appellee Simpson Logging Company.

The exclusive right to these tidelands asserted by these several grantees of the State of Washington, particularly the logging company, was manifestly widely known and the continued use and occupancy of such tidelands by the appellees dates therefrom. The witness, Fred Snelgrove, showed these operations started around 1900, according to the records of his company (Tr. 764), and involved the use of the tidelands for docks, dumps, sorting, rafting,

booming and the storage of logs over virtually the entire frontage of Section 26 (Tr. 766-7). Old piling marking these former operations appear in photographs A-3-8, pages 5 and 6, which can be compared with the photograph A-60. With respect to this appellee, the evidence is certainly clear as to occupancy and use.

Further, by the admitted facts in Article VII of the pre-trial order, page 36, it is clear the several appellees and their predecessors have been paying all of the taxes levied for many years on the tidelands and since the time of acquisition.

On the other hand, the Skokomish Indians over the intervening thirty to forty years, and the appellant incorporated tribe for approximately ten years after its incorporation, raised no question as to appellee's title until it suddenly filed this quiet title action.

Appellee contends appellant's claim is barred by the statute of limitations and the doctrine of laches. Appellee relies on RCW 7.28.050, .070 and .080. RCW 7.28.050, in substance, provides that all actions brought for the recovery of lands of which any person may be actually, openly and notoriously possessed for seven years under title deductible from the State, shall be brought within seven years after the first possession being taken. RCW 7.28.070, in substance, bars any claim as against a person who has paid taxes on land for seven successive years while he has been in actual, open and notorious

possession of the land under claim and color of title. RCW 7.28.080, in substance, provides every person having color of title in good faith to vacant and unoccupied land and pays taxes thereon for seven successive years shall be adjudged the owner thereof.

Clearly appellant's claim would be barred by the facts and terms of the above statutes. Appellant, however, contends that the statute of limitations and the doctrine of estoppel or laches are not applicable to claims of Indians, regardless of how long they delay in pressing a claim, and regardless of the equities of intervening innocent third parties.

No party claims laches or limitations run against the United States. But the United States is not a party to this action, and, in fact, has refused to become a party or to participate in the prosecution of this case. The cases cited by appellant merely show the United States is not bound by limitations or laches; in each instance the United States was asserting a claim. As admitted by appellant on page 32 of its brief, the cases they have cited "are in form ones brought by the United States as plaintiff for its ward." This does not resolve the question of whether the Indian tribe independently is immune from the statute of limitations and the doctrine of laches. Appellant, on pages 27 through 32 of its brief, sets forth substantial portions of its corporate charter and constitution. Section 1 thereof provides in part that the tribe is hereby "chartered as a body politic and corporate of the United States of

America." Section 5 (i) thereof provides in part that the corporate body has the power to sue and to be sued. These portions are inconsistent with and refute appellant's claim of immunity.

The Indians have not been in possession of the tidelands in Section 26, nor wandered over the same at will (Tr. 321-323, 446-450, 464-465). These areas have been occupied and used by appellees and their predecessors long before it was incorporated and continuously since. (See previous discussion as to occupancy and use of subject tidelands by appellees and their predecessors.) The Indians, with varying success, have been excluded from these beach areas since early in the century when the State first started selling the tidelands (Tr. 321-323, 446-450, 464-465). The Indians themselves had been allotted the uplands along this tideland strip, and they had already sold these uplands to appellee's predecessors pursuant to appropriate approval of the United States and proper Indian officials (Hanson map, Exhibit A-59; Admitted Fact VI, Exhibit A-21; A-64; A-25 to A-35; and A-2).

Appellee's position is that, while it may be proper not to apply statutes of limitations or the doctrine of laches to the United States, it does not follow that the court should adopt a hard and fast rule that under no circumstances should an Indian or a corporation succeeding to Indian rights be barred from asserting claims regardless of how stale or inequitable. The reason for the rule in connection with the United States is it is assumed the

government will act wisely and with discretion in pressing old or oppressive claims. This certainly could not be the justification for applying the rule contended for by appellant. Appellant's position can only be founded on the proposition that the Indians should be encouraged to press their claims whether stale or not, and regardless of the oppressive or harsh result to an innocent non-Indian.

Appellee's position finds support in the law.

Felix v. Patrick, 36 Fed. 457 (C.C.D. Neb. 1888), affirmed 12 S. Ct. 862, 145 U. S. 317, was an action to recover land based on fraud. The plaintiff heirs of a half-breed Indian were held to have not sued within the period of limitations and were therefore barred by laches. In so holding the court stated at page 461:

> "But it is earnestly contended that a different rule should be applied in this case because plaintiffs and their ancestors were Indians; that the law is very tender in respect to the rights of such persons, who are not familiar with our laws and methods of transacting governmental or private business, and were ignorant of the disposition which had been made of the scrip. And it is also urged that as Indians they were the wards of the government, and could not have asserted their rights to the property, even if they had known what their rights were. It is not shown that they were not persons of education and intelligence, or that they were not in fact familiar with the land laws, and the methods of governmental business, or that they were not in fact as competent to look after their rights as any person . . ."

and at page 462:

> "At any time during the last 27 years these plain-

> tiffs or their ancestors could have come into the courts of Nebraska and asserted their rights . . . The means of knowledge were open before them. They had the right to sue, and the courts would have given them full protection. It would savor little of equity to permit them to come in now and take from these many defendants, most of whom are innocent of any intentional wrong, property of such enormous value, on the ground that their ancestor 28 years ago was swindled out of scrip of such trifling value — a million dollars today for one hundred and fifty dollars 28 years ago. I cannot believe that equity demands or even tolerates this . . ."

This case was affirmed by the Supreme Court of the United States without ruling expressly on the laches question but the court did rule that plaintiff failed to set out facts which would indicate plaintiff was not guilty of laches.

In *Pope v. Falk*, 66 Kan. 793, 72 Pac. 246 (1903) (appeal dismissed 20 S. Ct. 761, 201 U. S. 651), the court held the plaintiff Indian was precluded by the doctrine of laches and stale claim from asserting title to land on the basis that the deed to his first grantee was not approved by the Secretary of Interior. In so holding that the claim was barred after the lapse of 30 years, the court stated:

> "If after the lapse of 30 years, the Indians and their grantee are not barred strictly under the statute of limitations, they are precluded from the enforcement of their claim under the doctrine of laches and stale claims, set forth in the opinion of this court in the case of *R. R. Dunbar et al v. Sanford M. Green et al* (just decided) 72 Pac. 243."

In *Dunbar v. Green,* 66 Kan. 557, 72 Pac. 243 (1903) he court held the Indian claimant of land was barred rom asserting, after a delay of 21 years, that the probate ourt lacked jurisdiction to order a sale of the land when he claimant was a minor. The land involved was pat-nted to the Indian claimant's mother pursuant to a treaty. The court assumed the deed was void but still dismissed he Indian's claim stating at page 245:

> "And we also approve on principle the doctrine that the fact that a litigant is a tribal Indian is not a complete bar to the defense of laches, although it is to be taken into account in determining the effect of his inaction. Whenever this defense is invoked, there must be a consideration of all special circumstances of the case. The mere extent of the delay is one item to be considered. Among others are any change of conditions, the intervention of the rights of third parties, the likelihood of other interests being affected by the delay, the presence of fraud and its character, the diligence required to discover it, and so on . . . His being an Indian entitles him to more liberal treatment in the matter just so far as it is an indication of his inferior capacity . . . To go further, and hold that it gives him absolute immunity from the consequences of his own neglect, would be to make it a means of injustice towards others, rather than of protection to himself . . . Apart from the mere fact of the claimant being an Indian there is nothing to excuse the delay in this case . . ."

This case was reversed in 25 S. Ct. 620, 198 U. S. 166, on the ground that the non-Indian brought the action and had neither title nor possession, and therefore had to prevail on the strength of his own title. The court, however, appears to state that, had the Indian brought the action, laches and the statute of limitations might not

have been a good defense.

It is submitted that based on the reasoning of the foregoing cases, appellant should be subject to the bar of the statute of limitations and the doctrine of laches or estoppel the same as any other citizen or corporation, for the following reasons, inter alia:

(1) Appellant is a corporation having the powers of a corporation to sue and be sued (Appellant's brief page 32, Exhibits 1 and 2). There is no showing that the corporation is in need of any more protection of its rights than any other corporation.

(2) There has been no showing that the Skokomish Indians are uneducated, ignorant or unfamiliar with governmental affairs. As a matter of fact, one would conclude a contrary situation existed from the caliber of the Indian witnesses who testified. Considerable point was made of the prominent position of one of the incorporators, who was in the State Legislature for many years (Tr. 439).

(3) Appellant corporation was incorporated by 1938 and not later than the year 1939 (Exhibit 1). Appellant claims to have the right to maintain this quiet title action, yet with that right to address its grievance to the court it delayed more than nine years in doing so.

(4) The Indians and their predecessors, whom appellant corporation claims to represent, could have commenced this action from thirty to forty years before it did.

(5) Many of the appellees acquired their interests in the tidelands for a valuable consideration after appellant was incorporated, and all appellees ac-

quired their interests after the Skokomish Indians could have commenced an action to establish their title.

(6) All appellees claim a bona fide purchase from Indian allottees who sold their allotments with proper approval for valuable considerations. (Admitted fact VI)

(7) There is no doubt that all of the appellees are innocent purchasers and there is no question of fraud, bad faith or overreaching.

(8) Appellant has made no attempt to explain or justify the delay in commencing this action.

Appellee therefore submits appellant should be required to abide by the same rules of justice and fair play as any litigant before the court. The various disabilities, if any, of appellant should only be considered as one element in determining whether the long delay in bringing this action was excusable. To adopt the rule that appellant is immune from its own neglect would not be necessary for reasonable protection of appellant's rights and would work a serious injustice to the many innocent appellees.

CONCLUSION

This appeal should be dismissed and the decision of the trial court affirmed. The findings of fact challenged by appellant are supported by the evidence. Appellant has failed to sustain the burden of showing said findings

to be "clearly erroneous." This issue alone resolves this case. However, appellee maintains the additional arguments made in its brief and the briefs of other appellees are also well taken, and fully answer and dispose of the arguments made by appellant.

Respectfully Submitted,

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